

How Should We Think About *Bush v. Gore*?

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“Honk if you’ve heard enough about *Bush v. Gore*”—that’s how Larry Tribe begins his comment in the November 2001 *Harvard Law Review* about the case.¹ It would be an understandable reaction at this point. Over a dozen books and dozens of law review articles about the case have already been published, with more coming out each week. Last spring, I declined some invitations to participate in symposia on *Bush v. Gore*² for fear that I had little left to say about the case. Yet now, a year-and-a-half after the decision, seems an important time to be discussing the decision. Largely this is because of the wonderful presenters at this symposium, but also because now it seems, with even a relatively short period of time for reflection, there is still so much to discuss.

Ironically, the huge amount of literature on *Bush v. Gore* is itself a reason for further discussion, sorting out what is insightful and helpful from what is not.³ Also, we are now seeing the first wave of lawsuits based on *Bush v. Gore*.⁴ More profoundly, *Bush v. Gore*, as much as

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1. Laurence H. Tribe, *eroG .v hsuB and its Disguises: Freeing Bush v. Gore From its Hall of Mirrors*, 115 HARV. L. REV. 170, 172 (2001).

2. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

3. See, e.g., *BUSH V. GORE: THE COURT CASES AND THE COMMENTARY* (E.J. Dionne, Jr. & William Kristol eds., 2001); CORRESPONDENTS OF THE NEW YORK TIMES, 36 DAYS: THE COMPLETE CHRONICLE OF THE 2000 PRESIDENTIAL ELECTION CRISIS (2001); ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001); HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION (2001); RICHARD POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001).

4. See, e.g., *Romeu v. Cohen*, 265 F.3d 118, 123 (2d Cir. 2001) (finding no “expressly declared constitutional right to vote for electors in presidential elections,” based on *Bush v. Gore*); *Walker v. Exeter Region Coop. Sch. Dist.*, 157 F. Supp. 2d 156, 159 n.6 (D.N.H. 2001) (rejecting challenges based on *Bush v. Gore*); Kevin Sack, *Counting Every Vote*, N.Y. TIMES, Jan. 21, 2001, § 4, at 5, available at LEXIS, News Library, The New York Times File (reporting that lawsuits based on *Bush v. Gore* have been filed in several states).

any Supreme Court case, forces us to think about the role of the courts and the relationship between law and politics in adjudication.

The events of September 11, 2001, increased, not lessened, the importance of *Bush v. Gore*. Before September 11, George W. Bush would have been remembered as the first President chosen by the Supreme Court. But after September 11, he likely will be remembered and evaluated for how he responded to the attacks. Yet, the importance of the presidency at this time magnifies the importance of that case. I doubt that I was the only one on the morning of September 11 to think of George W. Bush being the President and how he got there. I doubt that I was the only one who in seeing John Ashcroft as Attorney General thinks back to *Bush v. Gore*.

What I want to discuss, as the keynote to this terrific symposium, is how should we think about *Bush v. Gore*. I want to suggest that some ways that have been offered are not very helpful. I also want to suggest other ways that are potentially important, yet have not been adequately pursued. Thus, this paper will have two parts. First, what are ways of looking at *Bush v. Gore* that don't seem very useful?⁵ Second, what are some ways of examining the decision that have not been adequately pursued so far?⁶

At the outset, I need to offer a disclaimer. There is no neutral or objective view of *Bush v. Gore*, and I do not purport to have one. I voted for Al Gore. Perhaps more importantly, I did volunteer legal work for Al Gore in November and December of 2000. I went to Florida to argue the so-called "butterfly ballot" case in Florida trial court.⁷ At the request of the Gore legal team, I often drafted sections of briefs during the ensuing litigation. It certainly means that I cannot claim to be a neutral observer, but I also think that no one can.

I. NOT VERY HELPFUL WAYS OF THINKING ABOUT *BUSH V. GORE*

I want to begin by identifying some ways of looking at *Bush v. Gore* that have been advanced and do not seem very helpful or useful in understanding the decision. Considering why they are not helpful offers some possibly important insights.

5. See *infra* Part I (discussing why certain interpretations of *Bush v. Gore* have not been helpful in understanding its holding).

6. See *infra* Part II (considering five relatively less popular issues in *Bush v. Gore*).

7. See *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240 (Fla. 2000) (*per curiam*).

A. *The Claim that Bush v. Gore Will Undermine the Legitimacy of the Supreme Court*

Immediately after the decision, one of the most frequent questions I was asked by reporters was whether the ruling would irreparably damage the credibility of the Supreme Court. Certainly, many people on December 12, 2000, and the days following it expressed this concern. Justice Stevens eloquently expressed this fear in his dissent in *Bush v. Gore*:

The endorsement of [the majority's position] can only lend credence to the most cynical appraisal of the work of judges throughout the land. . . . Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.⁸

Yet, this loss of confidence has not manifested itself. According to Gallup polls, 65% of Americans expressed confidence in the Court as an institution in September 2000 and 62% expressed confidence in June 2001.⁹ Why has there not been the loss in legitimacy that so many predicted on December 12? There are many possible explanations, none mutually exclusive.

One explanation is that *Bush v. Gore* enhanced the Republican's view of the Court and lessened the Democrat's perception of the Court, so it evened out. Again, the Gallup polls provided some support for this. According to them, approval of the Court among Republicans went from 60% in August 2000 to 70% after the decision in December, while approval among Democrats shrunk from 70% in August to 42% in December.¹⁰

Second, any harm to the Court's credibility was likely short-lived. The country quickly accepted that George W. Bush was President, no matter how he got there, and moved on. This acceptance was true even before September 11. Certainly, as the nation's focus shifted, *Bush v. Gore* faded in significance.

Third, in such a close election, most people were willing to accept any result. The margin of statistical error was larger than the number of votes that decided the election. Most people understood that our system

8. *Bush v. Gore*, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting).

9. See Jeffrey M. Jones, *Hispanics, Whites Rate Bush Positively, While Blacks Are Much More Negative*, GALLUP NEWS SERVICE, June 21, 2001.

10. See Jeffrey M. Jones, *Opinion of U.S. Supreme Court Has Become More Politicized*, GALLUP NEWS SERVICE, Jan. 3, 2001.

of voting and counting votes was simply not precise enough to definitively resolve such a close election.

Fourth, people accepted that the Court made political choices. Those who suggested that the Court's legitimacy would be permanently harmed based this on the assumption that people would be shocked by the seemingly partisan split of the Court in *Bush v. Gore*. But after decades of high profile cases, ranging from *Brown v. Board of Education*¹¹ to *Miranda v. Arizona*¹² to current cases involving school prayer,¹³ people have realized that the Court makes value choices in deciding the meaning of the Constitution. The rejection of Robert Bork for the Supreme Court in 1987, for example, was all about recognition of the role of an individual Justice's ideology in constitutional decision-making.¹⁴

Finally, and most profoundly, the Supreme Court's legitimacy is not fragile. Claims about the Supreme Court having fragile legitimacy have been very important in American constitutional law. Justice Felix Frankfurter based his jurisprudence around it; recall his dissent in *Baker v. Carr*,¹⁵ in which he opposed the Court's involvement in reapportionment because of fear that it would undermine the Court's legitimacy.¹⁶ Scholars such as Alexander Bickel and, more recently, Jesse Choper, have built theories of judicial review around the premise that the Court must conserve its limited public legitimacy.¹⁷ But *Bush v. Gore* requires that we rethink what is even meant by the Court's legitimacy. Is it approval ratings in Gallup polls? Is it something deeper and less susceptible to measurement? However defined, *Bush v. Gore* indicates that the Supreme Court's legitimacy is robust, not

11. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

12. *Miranda v. Arizona*, 384 U.S. 436 (1966).

13. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

14. See, e.g., Erwin Chemerinsky, *The Constitution Is Not 'Hard Law': The Bork Rejection and the Future of Constitutional Jurisprudence*, 6 CONST. COMMENT. 29, 31 (1989) (emphasizing new role of ideology in proceedings); see also MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT (1992) (discussing how the defeat of Robert Bork's nomination to the Supreme Court in 1990 was a rejection of Bork's conservative ideology, particularly his narrow vision of the meaning of personal liberty under the Constitution); NORMAN VIEIRA, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS (1998) (analyzing the Bork proceedings and the impact of judicial ideology in the confirmation process).

15. *Baker v. Carr*, 369 U.S. 186 (1962).

16. *Id.* at 267-68 (Frankfurter, J., dissenting).

17. See ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962); JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).

fragile, and no single decision is likely to make much difference in the public's appraisal of the Court. The credibility of the Court is the product of over 200 years of American history; it is the result of confidence in the Court's methods and overall decisions. It reflects popular understanding of the desirability of resolving disputed questions in the courts and under the Constitution, even though it means that everyone knows that, at times, they will be on the losing side.

B. Bush v. Gore Was a Corrupt Decision

Some have suggested that *Bush v. Gore* was a baldly partisan choice by Republican Justices to make the Republican candidate the next President. Vincent Bugliosi and Alan Dershowitz have advanced this view.¹⁸ Indeed, Bugliosi argued that the Justices in the majority should be subjected to impeachment proceedings.

As is often true, a political cartoon expressed this partisanship well. On Friday, December 15, 2000, a cartoon by Paul Conrad in the *Los Angeles Times* depicted nine Justices behind the bench, with five holding "Bush for President" signs and four with "Gore for President" signs. The caption on the cartoon stated, "Why the Supreme Court does not want cameras in the courtroom."¹⁹

But I believe that the role of politics was more subtle and more profound. On Friday, December 8, after the Florida Supreme Court ordered the counting of uncounted votes, everyone I knew who voted for Gore praised the decision, and everyone I knew who voted for Bush decried the ruling. I immediately said that there was no reason to think that the Justices on the Supreme Court would be any different.

Look at the scholarly literature on *Bush v. Gore*. Democrats and liberals, like Larry Tribe, Alan Dershowitz, and Ronald Dworkin criticize the decision.²⁰ In contrast, Republicans and conservatives, such as Richard Posner, Nelson Lund, and Doug Kmiec all praise the ruling.²¹ Is this just coincidence? Imagine that the results in Florida and the nation had been reversed, and it was Gore who was slightly

18. VINCENT BUGLIOSI, *THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT 1* (2001); DERSHOWITZ, *supra* note 3, at 5.

19. Paul Conrad, *Cartoon, Why the Supreme Court Does Not Want Cameras in the Courtroom*, L.A. TIMES, Dec. 15, 2000, at B9.

20. See A BADLY FLAWED ELECTION: DEBATING *BUSH V. GORE*, THE SUPREME COURT, AND AMERICAN DEMOCRACY (Ronald Dworkin ed., 2002); DERSHOWITZ, *supra* note 3, at 41; Tribe, *supra* note 1, at 173.

21. See POSNER, *supra* note 3, at 1; Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219, 1219 (2002); Douglas Kmiec, *The Court's Decision Is Law, Not Politics*, L.A. TIMES, Dec. 14, 2000, at B11, available at 2000 WL 25927382.

ahead in the popular vote in Florida and would have a majority in the Electoral College by winning Florida. If the tables were turned, and it was Bush who was urging the counting of uncounted votes, would anyone really believe that the sides, on the Court or among academics, would be the same?

In fact, it would have been much easier for the dissenting Justices on the Court and liberal law professors to embrace the equal protection argument.²² Part of the irony of *Bush v. Gore* is that it was virtually the only case in which Justice Scalia or Justice Thomas found an equal protection violation, except in striking down affirmative action programs.

In other words, it was not that the five Justices in the majority set out to make sure that Bush became President, and the four dissenters acted to make sure that Gore was President. I truly believe that each of the nine Justices deeply believed that he or she was making a ruling on the law, not on partisan grounds. But how each saw the case was entirely a product of the Justices' biases and views.

This decision has profound implications for how we think about the law. First, we are all result-oriented, consciously or unconsciously, much of the time. We come to conclusions and then look for arguments to support them. We constantly hear criticisms of judges or academics for being result-oriented. Yet, there is no way to avoid this. The premises we begin with influence, if not determine, the conclusions we come to. *Bush v. Gore* unquestionably seemed a result-oriented decision in the sense that the nine Justices each came to a result that was consistent with their political views, so far as we know them. That does not mean that it was corrupt or even unique among judicial decisions. In the vast majority of important cases, the Justices' conclusions were a reflection of the views with which they started.

Second, because of this decision, the identity of the judges is all-important. If the Supreme Court had one more Justice appointed by a Democratic President, and one less appointed by a Republican, Al Gore would be President today. If Robert Bork had been confirmed as a Supreme Court Justice, rather than his replacement nominee Anthony Kennedy, *Roe v. Wade*²³ would have been overruled. In recent months, some Republicans seeking to gain approval of President Bush's nominees for the federal bench have argued that ideology should not be considered in the judicial confirmation process. This argument is

22. The core of the per curiam's argument was that counting uncounted votes without preset standards violates equal protection.

23. *Roe v. Wade*, 410 U.S. 113 (1973).

nonsense. The identity and views of the judges are all-important in determining their decisions. *Bush v. Gore* powerfully demonstrates this point. Presidents, including Bush, always select with an eye on ideology. The Senate must look to ideology as well in deciding who is acceptable for a lifetime federal judgeship.

C. *The Court Needed to Act to Prevent a Crisis*

Some, such as Judge Richard Posner and Professor John Yoo, have argued that *Bush v. Gore* was justified, even though its reasoning was flawed, to prevent a national crisis.²⁴ This is an ends justifies the means claim: the goal of preventing a political crisis was sufficiently important as to warrant a decision that was wrong as a matter of constitutional doctrine.

This argument is flawed both factually and normatively. Factually, it is wrong to say that a serious crisis would have occurred if the Supreme Court had denied review or upheld the Florida Supreme Court. If the Supreme Court had not stopped the counting on Saturday, December 9, the additional counting was to be completed by the end of Sunday, December 10.²⁵ There were two possibilities at that point: Bush would have remained ahead or Gore would have gone in the lead in Florida. No one can know which possibility would have occurred since the media's tabulation of the ballots after the election showed that Bush would have been ahead under the Gore approach to counting ballots, but Gore would have won Florida under the Bush approach.²⁶

If Bush had remained ahead in Florida, there obviously would have been no constitutional crisis. Bush would have carried Florida, won in the Electoral College, and no one would have objected.

If Gore was ahead in Florida, it would have been more complicated, but still not a crisis because federal laws provide a basis for resolving disputes.²⁷ In all likelihood, the Governor of Florida, Jeb Bush, would not have changed the ascertainment that he filed in the Electoral College certifying that his brother carried Florida. It also is possible that the

24. POSNER, *supra* note 3, at 188–89; John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 790 (2001). For an excellent criticism of Posner's analysis, see H. Jefferson Powell, *Overcoming Democracy: Richard Posner and Bush v. Gore*, 17 J.L. & POL. 333, 352 (2001).

25. *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla.) (per curiam), *rev'd per curiam sub nom. Bush v. Gore*, 531 U.S. 98 (2000).

26. See, e.g., Richard L. Berke, *Who Won Florida? The Answer Emerges, but Surely Not the Final Word*, N.Y. TIMES, Nov. 12, 2001, at A16, available at LEXIS, News Library, The New York Times File; *Recount Would Have Increased Bush Win, Papers Say*, L.A. TIMES, Apr. 4, 2001, at A10, available at 2001 WL 2475429.

27. See 3 U.S.C. §§ 1–15 (2000).

Republican-controlled Florida legislature would have passed a resolution awarding the Florida electors to Bush. But the Florida Supreme Court might well have declared that Gore carried the state based on the results of the recount that occurred pursuant to its order.

That would have meant two sets of electors from Florida, one for Bush and one for Gore. This situation has happened before, such as in 1960 when Hawaii designated two sets of electors, one for John F. Kennedy and one for Richard M. Nixon.²⁸ Federal law provides that if there are two sets of electors from a state, Congress decides which represents the state so long as both the House of Representatives and the Senate agree.²⁹ Such agreement was highly unlikely here. The House, which was controlled by Republicans, surely would have voted in favor of the Bush electors. But the new Senate that would have considered this was split evenly, 50/50, between Democrats and Republicans.³⁰ Under Senate rules, the Vice President breaks a tie.³¹ There, of course, is no doubt for whom Al Gore would have voted.

Federal law provides that if the House and the Senate disagree about which electors to recognize, the governor of the state decides.³² Obviously, there is no question as to which set of electors Jeb Bush would have chosen to represent Florida.

All of this would have been resolved by early January 2001, well in advance of January 20, the prescribed date for the inauguration of the new President.³³ Certainly, it would have been dramatic and even entertaining to watch. But a crisis that risked paralyzing the country? No serious risk of that existed. It certainly is possible to hypothesize legal issues that could have arisen along the way. What if the Florida Supreme Court ordered Governor Jeb Bush to change Florida's ascertainment in the Electoral College and he refused? But any legal issues could have been resolved as they arose and courts could have prevented a crisis then, rather than acting to forestall a feared crisis that was very unlikely to ever develop.

Normatively, the crisis argument is even more problematic. What exactly is meant by a "constitutional crisis"? Who decides if one

28. Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1421 n.55 (2001).

29. 3 U.S.C. § 15 (2000).

30. Lizette Alvarez, *Feminine Mystique Grows in Senate*, N.Y. TIMES, Dec. 7, 2000, at A30, available at LEXIS, News Library, The New York Times File (reporting that the Senate split 50/50).

31. U.S. CONST. art. I, § 3, cl. 4.

32. 3 U.S.C. § 6 (2000).

33. U.S. CONST. amend. XX, § 1.

exists? What powers does this bestow on the courts? During the 1990s, the federal government literally shut down because of a budget impasse between the White House and Congress.³⁴ Would this justify the federal courts stepping in and arbitrarily awarding additional budget power to one side or the other? No one made such a claim even when the federal government was closed for days for lack of funds. During the 1960s and 1970s, the executive branch waged an unpopular war without a formal declaration of war. Suits were brought to halt it as unconstitutional.³⁵ Was this a crisis that justified judicial intervention to stop an unconstitutional war that was costing thousands of lives and billions of dollars? The Supreme Court never thought so.

Those who advance the “crisis hypothesis” never explain why averting a crisis justifies changing the usual constitutional rules and doctrines. It is a frightening proposition because the government can easily claim that a variety of crises exist—fighting the war on terrorism, the war on drugs, stopping communism—and claim that each warrants actions that would otherwise be unconstitutional. Ignoring the Constitution in times of crisis goes against the very core of why there is a Constitution: to make sure that in difficult times core values and commitments are not sacrificed.

II. SOME ADDITIONAL AREAS TO EXPLORE IN THINKING ABOUT *BUSH V. GORE*

A great deal has been written about the two main constitutional issues considered by the Supreme Court: whether counting uncounted votes in Florida would have denied equal protection and whether it violated Article II of the Constitution and federal statutes to continue the counting. I have little to add to what has already been said about these two issues.³⁶ Instead, I want to identify five issues that I believe have received inadequate attention so far.

34. Francis Clines, *Act II of Federal Shutdown: Some See Politics of the Absurd*, N.Y. TIMES, Dec. 17, 1995, § 1, at 1, available at LEXIS, News Library, The New York Times File (reporting on the effect of the second government shutdown).

35. See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307, 1312–13, 1315 (2d Cir. 1973) (reversing the lower court’s decision granting declaratory and injunctive relief against the continuation of bombing and other military activities in Cambodia because the challenge presented a nonjusticiable political question), *cert. denied*, 416 U.S. 936 (1974); *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir.) (rejecting such challenges as presenting nonjusticiable political questions), *cert. denied*, 404 U.S. 869 (1971).

36. A particularly insightful analysis of the equal protection issue is found in Tribe, *supra* note 1, at 217. A particularly insightful analysis of the Article II issue is found in GILLMAN, *supra* note 3, at 159.

A. *Was a Remedy Possible for the Illegal Butterfly Ballots?*

The ballot in Palm Beach County was constructed in a misleading manner: the hole next to Gore's name was actually a vote for Patrick Buchanan. This resulted in approximately 4000 Palm Beach County voters mistakenly casting their votes for Buchanan, though intended for Gore.³⁷ This, of course, was far more than the margin of Bush's victory and more than enough to have made Gore the clear winner in Florida. When I went to Palm Beach County in late November 2000, I heard many voters complain that they discovered immediately after they voted that they had made a mistake and asked for a new ballot, but were refused.

A lawsuit seeking a new election in Palm Beach County was immediately filed in Florida. The Florida trial court dismissed that case, and the Florida Supreme Court affirmed the dismissal.³⁸ The Florida courts did not deny that the Palm Beach County butterfly ballot was illegally designed and that this likely decided the election; rather, they said that there was nothing the courts could do about this problem.³⁹ Commentators have accepted this conclusion with little analysis.⁴⁰

But is it right that there is really nothing that a court could have done as a remedy? Doesn't *Marbury v. Madison* say that a basic principle of law is that when there is a right, there must be a remedy?⁴¹ Indeed, many Supreme Court decisions articulate this rule.⁴² The obvious remedy here would have been for the Florida courts to order a new election in Palm Beach County with a properly constructed ballot. Only those who voted on November 7 would be allowed to vote in the new election. There were precedents in Florida law, as well as in other states, for ordering a new election as a remedy for serious violations that could not be cured in any other way.⁴³

37. John Allen Paulos, *We're Measuring Bacteria with a Yardstick*, N.Y. TIMES, Nov. 22, 2000, at A27, available at LEXIS, News Library, The New York Times File.

38. *Gore v. Harris*, 772 So. 2d 1243, 1259–62 (Fla.) (per curiam), *rev'd per curiam sub nom. Bush v. Gore*, 531 U.S. 98 (2000).

39. *Id.* at 1260–61 (per curiam).

40. See, e.g., Tribe, *supra* note 1, at 205–06.

41. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

42. See, e.g., *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *United States v. Morrison*, 529 U.S. 598 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999).

43. See, e.g., *Int'l Bhd. of Painters & Allied Trades v. Anderson*, 401 So. 2d 824 (Fla. Dist. Ct. App. 1981) (holding that a new ratification election was required when a union was guilty of unfair labor practices during a collective bargaining agreement ratification election); *Nelson v. Robinson*, 301 So. 2d 508 (Fla. Dist. Ct. App. 1974) (holding that an election is valid unless ballot defects clearly operate to prevent free, fair, and open choice, which is not determined by

The Florida trial court rejected this possibility, concluding that the Constitution requires a uniform day for choosing electors and that allowing a new election would violate this constitutional provision.⁴⁴ But this provision is not about Election Day, November 7; it is about the day that electors are chosen by each state, December 18, 2000, under federal law.⁴⁵ The trial court erred in reading this constitutional provision as a bar to a new election. In fact, it is possible to imagine other situations in which elections could be held after November 7. For instance, imagine a hurricane in Florida on Presidential Election Day that prevented the polls from opening or an earthquake in California with the same effect. The Florida trial court's analysis would have meant that those in areas where the polls did not open would have been completely denied the right to vote. That cannot be right; surely a different election day would have been designated. A recent example of this occurring was in New York City on September 11, 2001. The City Charter mandated that as Election Day, and the polls opened as scheduled.⁴⁶ But the tragedy that occurred early that day caused the election to be postponed until a later date.⁴⁷

This example is not meant to minimize the practical problems with holding a new election in Palm Beach County. How would all who voted, especially those who cast absentee ballots, be contacted and notified of the new election? Wouldn't the knowledge that they were deciding the presidential election likely have caused many to change their votes, such as Nader voters switching to Gore or Buchanan voters shifting to Bush? Should this likelihood have mattered? The new Palm Beach County election would have created a media circus, with all eyes focusing on what occurred there.

My point is simply that there has not been sufficient attention to what should have occurred in light of the illegal ballot in Palm Beach County and the effect that it had on the outcome of the election.

placement of the name on a ballot); *State ex rel. Olson v. Bakken*, 329 N.W.2d 575 (N.D. 1983) (holding that a special election is proper where the voters of votes not counted due to mis-labeling of ballots in a precinct can be identified and those votes recast).

44. *McDermott v. Harris*, No. 00-2700 (Fla. Cir. Ct. Nov. 17, 2000) (unpublished order denying a new election).

45. 3 U.S.C. § 7 (2000).

46. Adam Nagourney, *Primary Rescheduled for Sept. 25, With Runoff, if Necessary, Set for Oct. 11*, N.Y. TIMES, Sept. 14, 2001, at A2, available at LEXIS, News Library, The New York Times Files.

47. *Id.*

B. Should the Court Have Stayed the Counting on December 9?

On December 8, after the Florida Supreme Court handed down its decision, I repeatedly said in media interviews that the key was to watch whether the Supreme Court stayed the counting in Florida. If the counting occurred, and Bush was ahead, then the Court would have had no need to hold oral arguments or decide the case. But if the counting proceeded, and Gore was ahead, then it would have been far more difficult for the Supreme Court to have awarded the election to Bush. On Saturday morning, December 9, I was watching the television broadcast of C-Span showing the counting in Florida. I kept waiting to see if the Supreme Court would intervene. Of course, the Court did and by a 5-4 vote stayed the counting of the ballots in Florida.⁴⁸ At that point, I believed that the result was preordained: the Supreme Court would reverse the Florida Supreme Court and effectively award the election to Bush.

Because of the decision on December 12, there has been far less attention to the Court's order on December 9. Yet, there is an important legal issue here: Was the Court correct in holding that the requirements for a stay were met? A stay from the Supreme Court requires a demonstration that irreparable injury would occur without a stay.⁴⁹ Gore's lawyer, David Boies, is described as having been in a Washington restaurant at the time the stay was announced and screaming out, "What is the irreparable harm?"⁵⁰

What indeed? The Supreme Court issued no opinion justifying the stay. But Justice Antonin Scalia, writing only for himself, issued an opinion on December 9 explaining the stay.⁵¹ He said that Bush met the requirements for a stay: showing a substantial likelihood of prevailing on the merits and irreparable injury.⁵² Justice Scalia identified two injuries. First, Justice Scalia said that counting the uncounted votes risked placing a cloud over the legitimacy of a Bush presidency.⁵³ In other words, if the counting put Gore ahead, but the Supreme Court disallowed it, there would be doubts about the legitimacy of Bush's presidency. But such speculation as to political fallout hardly seems to meet the legal requirement for "irreparable injury." Maybe that would

48. *Bush v. Gore*, 531 U.S. 1046, 1046 (2000) (per curiam) [hereinafter *Bush I*].

49. *Id.* at 1047 (Stevens, J., dissenting).

50. David Firestone, *Supreme Court, Split 5-4, Halts Florida Count in Blow to Gore*, N.Y. TIMES, Dec. 10, 2000, § 1, at 1, available at LEXIS, News Library, The New York Times File.

51. *Bush I*, 531 U.S. at 1046-47 (Scalia, J., concurring).

52. *Id.* (Scalia, J., concurring).

53. *Id.* at 1047 (Scalia, J., concurring).

have put a cloud over the Bush presidency, or maybe people would have just accepted him as President anyway. The reality is that the Supreme Court's halting the counting also put a cloud over the Bush presidency. For those who voted for Gore on November 7, there always will be a cloud over the Bush presidency; for those who voted for Bush, they always will be thrilled that their candidate won. It is hard to turn this into irreparable injury.

Second, Justice Scalia said that counting the ballots would cause them to degrade, and thus prevent, a more accurate count later on.⁵⁴ The problem with this argument is that there was *nothing* in the record to support Scalia's assertion about degradation of ballots. He just made it up. Moreover, it was a disingenuous concern: the Court prevented counting so as to protect a more accurate later counting that it prevented from occurring.

Is there any way to justify the Court's order stopping the counting on December 9? Shouldn't the counting have continued, even though the Supreme Court was going to hear the matter on December 11?

C. *Should the Court Have Decided Bush v. Gore?*

Was *Bush v. Gore* justiciable when the Court decided it on December 12? The Supreme Court did not address this issue, perhaps because it was not raised in the briefs. But justiciability is jurisdictional and courts are required to raise jurisdictional issues *sua sponte*.⁵⁵

There are serious reasons to doubt the justiciability of *Bush v. Gore*.⁵⁶ For several reasons, the issues before the Supreme Court in *Bush v. Gore* were not ripe for review. The central issue was whether the counting of votes would deny equal protection.⁵⁷ There would be a constitutional violation only if similar ballots were treated differently in the counting process.⁵⁸ But it could not be known if this would occur until the counting occurred and the trial judge in Florida, Judge Lewis, ruled on all of the challenges. Until then, it was purely speculative as to whether there would be a problem with similar ballots being treated differently.

The Supreme Court, in its *per curiam* opinion, focused on inequalities that already had occurred. The *per curiam* opinion points to differences

54. *Id.* (Scalia, J., concurring).

55. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98–99 (1998).

56. I develop this argument more fully in Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1098 (2001).

57. *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (*per curiam*) [hereinafter *Bush II*].

58. *Id.* at 105–06 (*per curiam*).

in the Miami-Dade County and the Palm Beach County counting.⁵⁹ But the counting that already had been done was not the issue before the Supreme Court.⁶⁰ The only issue was whether the counting should continue.⁶¹ The prior experience was not predictive of what was to occur because of a key change: a single judge was overseeing the counting under the Florida Supreme Court's decision.⁶² This judge was to hear all of the disputes and potentially could eliminate any inequalities by applying a uniform standard.⁶³

Justice Stevens emphasized exactly this point in his dissent. He wrote: "Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process."⁶⁴ Justice Stevens, however, did not draw a key conclusion from his observation: the challenge to the counting was not ripe for review. Only after the counting was completed could the parties claim that there was inequality and thus a constitutional violation.

Phrased another way, the Supreme Court improperly treated an "as applied" equal protection challenge as if it were a facial challenge. Bush was not arguing that the Florida election law was unconstitutional on its face. Neither in the briefs nor in the oral argument did Bush's lawyers suggest such a facial attack. Rather, Bush argued that counting without uniform standards denied equal protection.⁶⁵ This would be an equal protection violation only if, after the counting and the resolution of disputes by the judge, similar ballots were treated differently. But that could not possibly be known until all the ballots were counted.

59. *Id.* at 106–08 (per curiam).

60. At one point, the per curiam opinion argues that the past inequalities were relevant. The Court stated: "That brings the analysis to yet a further equal protection problem. The votes certified by the court included a partial total from one county, Miami-Dade. The Florida Supreme Court's decision thus gives no assurance that the recounts included in the final certification must be complete." *Id.* at 108 (per curiam). But even the Supreme Court's phrasing acknowledges that it was speculative as to whether there would be incompleteness by the time the counting was finished. The existence and extent of this incompleteness could not be known when the Supreme Court decided the case on December 12 precisely because the Court had stayed the counting process.

61. *Id.* at 110 (per curiam).

62. *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla.) (per curiam), *rev'd per curiam sub nom. Bush II*, 531 U.S. 98 (2000).

63. *Id.* (per curiam).

64. *Bush II*, 531 U.S. at 126 (Stevens, J., dissenting).

65. Pet. for a Writ of Cert. at 20–23, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (No. 00-836), LEXIS 2000 U.S. Briefs 836.

Until then, it would be purely speculative as to whether there would be a denial of equal protection.

Bush v. Gore was not ripe for an even more basic reason: George W. Bush might well have ended up ahead after the counting. In that event, there obviously would have been no need for the Supreme Court to decide his appeal. The Supreme Court repeatedly has held that a case is not ripe when it is unknown whether the injury will be suffered.⁶⁶

Bush v. Gore was not ripe for review on December 9, when the stay was issued, or December 11, when the case was heard, or December 12, when the case was decided. The case would have been ripe only after all the counting was done if: a) Gore came out ahead in Florida, and b) Bush could present evidence of inequalities in how the ballots were actually counted. Until and unless these eventualities occurred, the case was not ripe and should have been dismissed.

Also, it can be questioned whether the Supreme Court should have found *Bush v. Gore* not justiciable as a political question. The most famous defense of the political question doctrine was made by the late Professor Alexander Bickel.⁶⁷ Professor Bickel wrote:

Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.⁶⁸

Although Bickel wrote these words almost four decades ago, they seem almost prescient when applied to *Bush v. Gore*. Certainly in terms of (a), there is "strangeness of the issue" and its intractability to a principled resolution. Never before in history had the Supreme Court decided a presidential election. The Court said that counting the ballots

66. See, e.g., *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974) (holding that complaint failed to satisfy the threshold requirement of alleging an actual case or controversy, in that none of the plaintiffs were identified as having suffered any injury); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (explaining that the basic rationale of requiring ripeness is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements").

67. See Alexander M. Bickel, *The Supreme Court 1960 Term; Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961); see also BICKEL, *supra* note 17, at 183 ("The culmination of any progression of devices for withholding the ultimate constitutional judgment of the Supreme Court—and in a sense their sum—is the doctrine of political questions.").

68. BICKEL, *supra* note 17, at 184.

without uniform standards would be unequal,⁶⁹ but no prior decision ever had found variations among counties in election practices to be unconstitutional. Nor did the Court explain why this inequality was impermissible while many others in Florida, such as differences in voting machines, in ballots, and in treatment of minority voters, were constitutional.

Indeed, the Court seemed aware of the problems with applying equal protection to such variances among counties and with opening the door to challenges to virtually every election because of reliance on local election officials. The per curiam opinion said: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."⁷⁰ This certainly confirms Professor Bickel's concerns about the strangeness of the issue and the lack of principles for resolution of it.

Professor Bickel's second factor, (b), is even more relevant: "the sheer momentousness of [the issue], which tends to unbalance judicial judgment."⁷¹ If any case fits this description, it surely is *Bush v. Gore*.

Professor Bickel's latter two criteria, (c) and (d), point to a concern over what issues should be decided by unelected judges. Bickel's concern was how involvement in some political issues could compromise the legitimacy of the Court.⁷² Although I am critical of Bickel's view and of many of the uses of the political question doctrine,⁷³ *Bush v. Gore* obviously cost the Supreme Court enormously in terms of its credibility. Over forty-nine million people voted for Al Gore and undoubtedly virtually all of them regard the Court's decision as a partisan ruling by a Republican majority in favor of the Republican candidate. Few cases, if any, in American history have been more widely perceived as partisan than *Bush v. Gore*. My point here is not to undertake a thorough analysis of the political question doctrine issue—or of justiciability—but rather, to indicate that this is a serious question that has not received sufficient attention.

69. *Bush II*, 531 U.S. at 104–05 (per curiam).

70. *Id.* at 109 (per curiam).

71. BICKEL, *supra* note 17, at 184.

72. *Id.* at 193–98.

73. See ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 98–102 (1987).

D. What Are the Implications of the Court's Equal Protection Analysis?

The per curiam opinion in *Bush v. Gore* held that counting the uncounted votes without legal standards violated equal protection.⁷⁴ In other words, the Supreme Court said that significant variations within a state in a presidential election deny equal protection. But this has profound implications for the conduct of elections in the United States. By this reasoning, the entire election in Florida denied equal protection and was unconstitutional. There were major differences in Florida among counties in how the ballots were designed, how absentee ballots were handled, how minority voters were treated at the polls, and what types of voting machines were used.⁷⁵ By the Court's reasoning all of these variations violated equal protection.

These intra-state differences, of course, were not limited to Florida. In every state except Oklahoma, county officials have significant discretion with regard to aspects of conducting elections.⁷⁶ Does this mean that all of these elections are unconstitutional?

The Supreme Court in *Bush v. Gore* tried to duck these implications by declaring, "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."⁷⁷ In other words, the Court said that it was deciding the issue only for this case and only for this day.

But that, of course, is not how the legal system operates. Decisions do create precedents, and litigants undoubtedly will base lawsuits on the reasoning of *Bush v. Gore*. Immediately after September 11, I asked Mark Rosenbaum, the Legal Director of the Southern California American Civil Liberties Union, whether he planned to bring a suit based on *Bush v. Gore*. He said yes, but he was going to ask his assistant to go through the Los Angeles phone book to find people named Bush to be the plaintiffs; he said that he thought the Supreme Court's decision only might have precedential effect with a plaintiff named Bush. The Southern California ACLU did file suit challenging

74. *Bush II*, 531 U.S. at 110 (per curiam).

75. See, e.g., David Gonzalez, *Blacks, Citing Flaws, Seek Inquiry Into Florida Vote*, N.Y. TIMES, Nov. 11, 2000, at A13, available at LEXIS, News Library, The New York Times File (expressing charges of minority vote suppression); Kevin Sack, *In Desperate Florida Fight, Gore's Hard Strategic Calls*, N.Y. TIMES, Dec. 15, 2000, at A1, available at LEXIS, News Library, The New York Times File (examining the disparities in ballots and voting machines used).

76. GENERAL ACCOUNTING OFFICE, ELECTIONS: PERSPECTIVES ON ACTIVITIES AND CHALLENGES ACROSS THE NATION 154 (2001).

77. *Bush II*, 531 U.S. at 109 (per curiam).

the differences in voting machines used among counties in California, with varying degrees of accuracy.⁷⁸ Lawsuits have been filed across the country based on *Bush v. Gore*.⁷⁹

The key question is which intra-state variations violate equal protection. The core basis for the Court's decision in *Bush v. Gore* was that voting is a fundamental right under equal protection. This, of course, is not new. Challenges to intra-state differences might have been brought even without *Bush v. Gore*. But the case certainly has brought this issue to everyone's attention: which variations violate equal protection? This is the crucial question for courts and scholars to consider in the months and years ahead.

E. What Are the Implications of Bush v. Gore for Federalism?

In analyzing *Bush v. Gore*, one of the most important areas to consider is its treatment of federalism. The supreme irony of the case is that the majority was comprised of five Justices who are revolutionizing constitutional law through their commitment to federalism and states' rights, but here showed no deference whatsoever to the state court.

The Supreme Court's per curiam opinion made two arguments. First, counting the uncounted votes without standards violates equal protection.⁸⁰ Second, *Florida law* prevented the counting from continuing past December 12.⁸¹ This second point is indispensable to the Court's decision to end the counting. Assuming that there were inequalities in the counting that violated the Constitution, there were two ways to remedy this situation: count none of the uncounted ballots or count all of the ballots with uniform standards. The latter would involve remanding the case to the Florida Supreme Court for development of standards and for such relief as that court deemed appropriate.

It must be emphasized that the Supreme Court did not hold that federal law prevented the counting from continuing. The only reason for not remanding the case—for which Justices Souter and Breyer argued⁸²—was the Court's judgment that Florida law prevented this. In two paragraphs near the end of the per curiam opinion, the Court explained why it was stopping the counting:

78. *Common Cause v. Jones*, No. 01-03470-SVW(RZ), 2002 WL 1766410 (C.D. Cal. May 9, 2002).

79. B.J. Palermo, 'Bush v. Gore' Prompts Voter-Access Suits by Civil Rights Group, NAT'L L.J., May 11, 2001, at A1.

80. *Bush II*, 531 U.S. at 103 (per curiam).

81. *Id.* at 110-11 (per curiam).

82. *Id.* at 129 (Souter, J., dissenting); see also *id.* at 144 (Breyer, J., dissenting).

The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U.S.C. §5. . . . That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. . . . The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. §5, JUSTICE BREYER'S proposed remedy—remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest under December 18—contemplates action in violation of the Florida Election Code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. Ann. §102.168(8) (Supp. 2001).⁸³

This reasoning is recited at length to show that the sole reason the Court gave for ending the counting was based on its interpretation of Florida law. However, no Florida statute stated or implied that the counting had to be done by December 12. The sole authority for the Supreme Court's conclusion was one statement by the Florida Supreme Court.

However, that statement was made in a very different context and when the Florida Supreme Court was not faced with the issue posed by the Supreme Court's ruling. After the Supreme Court decided on December 12 that the counting without standards violated equal protection, the issue was what remedy was appropriate under Florida law: continue the counting past December 12 or end the counting to meet the December 12 deadline. The Supreme Court could not possibly know how the Florida Supreme Court would resolve this issue because it never had occurred before. Prior Florida decisions emphasized the importance of making sure that every vote is accurately counted.⁸⁴ The Florida Supreme Court might have relied on this to continue the

83. *Id.* at 110–11 (per curiam) (alteration in original).

84. *See, e.g., State ex rel. Millinor v. Smith*, 144 So. 333, 335 (Fla. 1932) ("The right to a correct count of the ballots in an election is a substantial right which it is the privilege of every candidate for office to insist on, in every case where there has been a failure to make a proper count . . .").

counting past December 12. Alternatively, the Florida Supreme Court might have ended the counting, treating December 12 as a firm deadline in Florida.

Indeed, after *Bush v. Gore* was decided, the Florida Supreme Court issued a decision dismissing the case.⁸⁵ Justice Shaw, in a concurring opinion, declared:

[I]n my opinion, December 12 was not a “drop-dead” date under Florida law. In fact, I question whether any date prior to January 6 is a drop-dead date under the Florida election scheme. December 12 was simply a *permissive* “safe-harbor” date to which the states could aspire. It certainly was not a *mandatory* contest deadline under the plain language of the Florida Election Code⁸⁶

Perhaps a majority of the Florida Supreme Court would have followed this view, perhaps not. The point is that this was a question of Florida law to be decided by the Florida Supreme Court. Of course, it is clearly established that state supreme courts get the final word as to the interpretation of state law. In *Murdock v. City of Memphis*,⁸⁷ in 1874, the Supreme Court held that it could review only questions of federal law, and that the decisions of the state’s highest court are final on questions of state law.⁸⁸ The Court explained that § 25 of the Judiciary Act was based on a belief that the Supreme Court must be available to ensure state compliance with the United States Constitution, but that there was no indication that Congress intended the Court to oversee state court decisions as to state law matters.⁸⁹

From a federalism perspective, it is inexplicable why the five Justices in the majority—usually the advocates of states’ rights on the Court—did not remand the case to the Florida Supreme Court to decide under Florida law whether the counting should continue. The Supreme Court impermissibly usurped the Florida Supreme Court’s authority to decide Florida law in this extraordinary case.

CONCLUSION

Bush v. Gore is one of the most important Supreme Court decisions in American history. It is the only instance in which the Supreme Court decided the outcome of a presidential election. The decision will be, and should be, analyzed as long as there is a United States. This essay

85. *Gore v. Harris*, 773 So. 2d 524 (Fla.) (per curiam), *rev’d per curiam sub nom. Bush II*, 531 U.S. 98 (2000).

86. *Id.* at 528–29 (Shaw, J., concurring) (footnotes omitted).

87. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874).

88. *Id.* at 626.

89. *Id.* at 630.

has attempted to suggest some fruitful, and some less useful, ways of appraising the decision.

